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No. 96-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

COUNTY OF NASSAU; Nassau County Executive; Nassau County Comptroller; Nassau County Board of Supervisors; Nassau County Civil Service Commission,

Petitioners,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME), et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents American Federation of State, County, and Municipal Employees, AFL-CIO and the plaintiff class of individual employees (collectively, "AFSCME") submit this brief in opposition to the petition for a writ of certiorari filed by the County of Nassau, New York and various county officials (collectively, "the County"). The County seeks review of a

unanimous decision of the United States Court of Appeals for the Second Circuit holding that the County was not entitled to an award of attorney's fees and expert witnesses fees as the prevailing defendant in an employment discrimination action brought by AFSCME. The petition is entirely meritless and should be denied.

STATEMENT

In 1983, respondent AFSCME, which represents many Nassau County employees, conducted a comprehensive study of the County's compensation system. The study revealed a pattern of pay disparities between male-dominated and female-dominated jobs that could not be squared with the County's published criteria for assigning wages to particular jobs. AFSCME and several other plaintiffs filed this action a year later, alleging that the County had intentionally discriminated in setting wages for jobs performed primarily by women.

The County claimed at the time that the salary grades it had assigned to various job titles were based on criteria developed and applied during a 1967 review of the County's compensation system by the consulting firm Cresap, McCormick and Paget. See Pet. App. A7-A8, A62-A75. The Cresap review resulted in an entirely new set of job titles and job descriptions, with salary grades assigned based on four factors: (1) knowledge and skills required for the job; (2) complexity and variety of duties required; (3) responsibility for independent action; and (4) supervisory responsibility. See Pet. App. A7. Plaintiffs claimed, however, that the pay disparity between predominantly female and predominantly male jobs, which emerged in 1967 and persisted until the time of suit, could not be explained by reference to these factors. They also asserted that women in a few specific job titles were doing the same work as men assigned to higher-paid titles.

The County moved to dismiss the complaint for failure to state a claim, but the district court held that "as a matter of law, [plaintiffs had] state[d] claims for intentional discrimination under the disparate treatment theory of Title VII." AFSCME v. County of Nassau, 609 F. Supp. 695, 711 (E.D.N.Y. 1985). Two years later, the court certified a class of all women who, since July 28, 1982, had worked in county jobs that had 70 percent or more female incumbents. AFSCME v. County of Nassau, 664 F. Supp. 64 (E.D.N.Y. 1987).

In a 16-day trial in 1989-1990, respondents attempted to show that jobs performed mainly by women were intentionally given pay grades lower than they would have received based on a neutral application of the County's own wage-setting criteria. See Pet. App. A154-A161 (district court opinion summarizing caselaw supporting such Title VII claims). Plaintiffs relied primarily on the testimony of two expert witnesses. See Pet. App. A10-A12. Dr. Stephan Michelson, an experienced labor economist, see Pl. Ex. 1056, conducted a major statistical study of wages in Nassau County, which averaged about $8000 higher for employees in male-dominated job titles than for employees in female-dominated job titles. Using statistical regression techniques, Michelson sought to determine how much of the differential could be explained by 78 gender-neutral variables reflecting various job characteristics. Michelson concluded that, while these other variables explained some of the apparently gender-based pay disparity, there remained a gap of about $3000 -- or approximately two salary grades -- between the salaries of equivalent male- and female-dominated jobs. See Pet. App. A118.

Plaintiffs' other expert was Donald Treiman, a professor of sociology at UCLA and a leading expert on pay equity for women. Pl. Ex. 1073. Treiman studied the 1967 Cresap job evaluation process, using several different methodologies. First, Treiman looked at the salary grades assigned by Cresap in 1967 to male- and female-dominated jobs with respect to (1) the years of training and experience required and (2) whether they involved supervision of others. Second, Treiman's research team applied the Cresap four-factor point system using the original Cresap descriptions of several hundred jobs. The results of Treiman's studies were very consistent: on average, the actual grades given to female-dominated jobs in 1967 were 2-3 salary grades lower than the grades given to other jobs that had the same training and experience/supervisory requirements or had been rated as equivalent by the graduate students. See Pl. Ex. 1074 at 13, 16.

Finally, Dr. Treiman undertook a statistical analysis of the point scores for jobs listed on plaintiffs' Exhibit 616 -- a document that was generated during the Cresap job-evaluation process in the 1960s and was identified at trial by one of the participants in the Cresap process as reflecting the actual conclusions reached by the Cresap team about the application of the point factors to each job title. Nov. 29, 1989 Trial Tr. at 356. Dr. Treiman converted the points on exhibit 616 to grades and compared the results with the actual grades assigned in 1967. He found that the actual grades assigned were much more favorable to male-dominated jobs. As a result, the average grade differential between female-dominated and other jobs with equivalent training and experience requirements and supervisory duties increased by approximately 1.6 salary grades. See Pl. Ex. 1075 at 6. In sum, Dr. Treiman's three studies of the Cresap process corresponded closely to Dr. Michelson's

extensive analysis of current salaries, with both experts testifying that there was a pay differential between predominantly female jobs and predominantly male jobs, in the range of 1.5 to 2.5 salary grades, that (1) could not be explained by job characteristics and (2) apparently had its origin in the discriminatory application of the Cresap criteria for setting pay based on job characteristics.

The defendants countered this evidence with two expert witnesses of their own. See Pet. App. A12. These experts, while raising some questions about the Treiman and Michelson methodologies, never disputed the fact that, if one looked only at the intrinsic characteristics of jobs, female-dominated jobs in Nassau County were not paid on the same basis as male-dominated jobs. Indeed, their own rating system supported the conclusion that all-female jobs in Nassau County were paid on average $1900 less than otherwise equivalent all-male jobs. See Def. Ex. GGG-1, Table 14. See also id. Table 13; Def. Ex. KKK-12. These experts testified, however, that this differential would be explained by reference to the outside labor market.

In addition to the expert testimony summarized above, the evidence at trial focused on (1) the details of the Cresap process, (2) the County's wage-setting criteria and responsiveness to market forces in the years after the Cresap study, and (3) the County's past history of segregating some jobs by gender and the adequacy of its affirmative efforts to integrate its work force. Plaintiffs also presented evidence concerning the equal pay claims, attempting to show that female employees in several job titles did essentially the same work as male employees in higher-paid titles.

In 1992, the district court issued a lengthy opinion, ruling for the defendants on the broad pay-equity claim and on all of the equal pay claims except one -- involving female "police detention aides" and male police officer turnkeys. See Pet. App. A55. The court did not question plaintiffs' legal theory, and was at times critical of the defenses mounted by Nassau County, but it reserved its strongest criticism for plaintiffs' expert witnesses -- labelling them, at various points, as "evasive" and as "partisans." It found methodological flaws in Dr. Treiman's "training and experience" and "graduate student" studies that, in its view, rendered them unreliable. Pet. App. A77-A92.[1] With respect to Dr. Treiman's analysis of Exhibit 616, the court refused to credit the testimony at trial that this document reflected the results of the point evaluation of jobs in the Cresap process. Pet. App. A99. The court also expressed serious reservations about the methods used by Dr. Treiman to select data from this document, concluding that these methods were so deficient that they fatally undercut his analysis.[2]

With respect to Dr. Michelson's work, the court noted a

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[1]The court simultaneously saw *no* basis for relying on defendants' expert's responses to these Treiman studies -- *i.e.*, the analyses where he took versions of Dr. Treiman's regression equations and added variables supposedly representing the market or hours worked. Pet. App. A90-A91. It pointed out that there was no evidence that these factors played any role in the Cresap process. Id.

[2]Here again, however, the court gave little or no credence to defendants' experts' responses to the Exhibit 616 study, which had attempted to explain the grade changes at issue by reference to "market" data and the pre-Cresap grades of jobs. The problem, once more, was the complete absence of evidence that anyone in 1967 actually relied on such factors in adjusting grades. See AFSCME v. County of Nassau, 799 F. Supp. 1370, 1391 (A75).

variety of concerns, but gave primary emphasis to Dr. Michelson's failure to include in his analyses a variable or variables reflecting the "market" wage for each job. However, the court elsewhere noted the absence of evidence that the market played any role in the actual Cresap process on which the County's salary grades were based. Pet. App. A90-A91 ("the court is unable to conclude that the Cresap team actually considered market data in setting individual salary grades"); Pet. App. A106 (finding "no satisfactory basis on which to conclude that the Cresap process entailed the use of labor market data to set specific salary grades").

Turning to the non-statistical evidence, the court found that Nassau County's work force was in fact highly sex-segregated but that formal barriers to integration had been eliminated by the 1970s and that the "better explanation" for the current situation is that men and women prefer different jobs. Pet. App. A139.

Thus, while acknowledging that plaintiffs had articulated a legally valid claim, the trial court held that they had not presented sufficient evidence to carry their burden of proof with respect to the broad claim of discrimination against all workers in predominantly female job titles. The court did, however, rule that plaintiffs had proved intentional discrimination based on gender with respect to one job title. It held that the duties of employees in the entirely female job title of police detention aide and the duties of male police officers assigned as "turnkeys" were substantially similar and that the salary disparity between these two groups is plainly attributable to intentional discrimination. Pet. App. A167. This ruling led to the award of more than $1.6 million to 17 women who have served as police detention aides. Pet. App. A24.

Defendants moved for an award of attorneys fees and costs, arguing that, as of the time the case was *ready for trial*,

plaintiffs should have known their claims lacked merit and should not have proceeded further. On this basis, defendants argued that they had satisfied the standard for fee awards to Title VII defendants set forth in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), requiring, as a predicate for any fee award to a prevailing defendant, a finding that the case was "frivolous, unreasonable, or groundless."

In 1993, the district court granted defendants' motion. Pet. App. A37. In its opinion, the court began with a critique of the Christiansburg standard, suggesting that the Supreme Court had departed from the "plain meaning of the statute derived from the unambiguous words" when it "engrafted" on the statute a distinction between prevailing civil rights plaintiffs and prevailing defendants. See Pet. App. A40-A43. The court then proceeded to quote at length from its own prior critique of plaintiffs' experts and concluded that, overall, plaintiffs' evidence "fell considerably short of the mark." Pet. App. A47.

In determining whether the case was "frivolous" under Christiansburg, the court drew a distinction between (1) a case brought by a "modestly salaried employee or group of employees" against a wealthy defendant, and (2) this case, involving a major union which invested in costly expert studies and had "very able and experienced counsel." Pet. App. A49. Then, recognizing its obligation to avoid "post hoc reasoning" in the application of the Christiansburg standard, the court nevertheless stated that it was necessary to base its ruling on a "kaleidoscopic view of the entire case which was possible only from the vantage point of time." Pet. App. A51. From that vantage point, the court concluded that a fee award would serve the purposes of the statute, and awarded the $982,407.23 in attorneys fees requested by the defendants, covering all of their

work since the complaint was filed in 1984, including work on the police defendant aides claims on which plaintiffs had prevailed.

The court deferred decision on the issue of expert fees in 1993, because the only basis for an award of expert fees was section 113 of the Civil Rights Act of 1991, the applicability of which to cases arising before 1991 was then before this Court. Subsequently, in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), this Court held that other key provisions of the 1991 Act apply only prospectively. Nevertheless, on May 31, 1995, the court issued an order distinguishing Landgraf and applying section 113 of the Act retroactively so as to entitle defendants to an additional award of $550,974.66 in expert fees. Pet. App. A26-A27.

The Second Circuit unanimously reversed the district court's awards of attorney's and expert fees against respondents. The court of appeals first noted that respondents had "established a prima facie case of gender-based pay discrimination by introducing statistics tending to show an unexplained differential in wages," Pet. App. A19 (citing, inter alia, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 306-08 (1977)), and observed that defendant's expert had conceded that there was indeed "a gap between the salaries of men and women in Nassau County that is not explained by job specifications alone." Pet. App. A20 (quoting district court). The court of appeals held that the trial judge had erred by designating plaintiffs' presentation of a prima facie case of discrimination as "meaningless" for purposes of the Christiansburg inquiry. Pet. App. A20 (quoting district court). Pet. App. A20-A21. The court also observed that the trial court's denial of the County's motion to dismiss and later its motion for a directed verdict were "in some tension" with the

court's finding that plaintiffs' claims were frivolous. Pet. App. A25 n.2.

The court of appeals held that plaintiffs had introduced sufficient evidence on their claims of intentional discrimination to defeat the conclusion that the claims were frivolous, unreasonable, or groundless under Christiansburg. Noting that establishing intent "is difficult in any case," the court observed that plaintiffs' experts had tried to show that the undisputed disparity between male- and female-dominated jobs was the result of discrimination. The court noted that the district court's negative assessment of plaintiffs' expert testimony depended heavily on credibility determinations and on "the counterweight of the County's experts and studies," factors that plaintiffs "cannot be required to have anticipated ... prior to trial." Pet. App. A22. Furthermore, there was no evidence, and the district court had not found, that AFSCME had "'continued to litigate'" initially meritorious claims after those claims 'clearly became' frivolous. Pet. App. A22 (quoting Hughes v. Rowe, 449 U.S. 5, 15 (1980) (quoting in turn Christiansburg, 434 U.S. at 422)).

Turning to the substantiality of plaintiffs' case, the court observed that "a claim is not necessarily frivolous because a witness is disbelieved or an item of evidence is discounted, disproved or disregarded at trial." Pet. App. A23 (citations omitted). It noted that when evidence is introduced that would be sufficient to support a judgment for plaintiffs, a fee award is generally unjustified. Pet. App. A23 (citations omitted). Here, the court concluded, plaintiffs had "offered evidence as to each element" of their claim, and, had their evidence been credited by the district court, "could have prevailed" -- as the district court itself had recognized. Pet. App. A23-A24 (quoting district court's observation that only the work of "very able and experienced defense counsel" had prevented plaintiffs from winning at trial). In these circumstances, the Second Circuit

concluded, a fee award was not justified, at least "in the absence of intentional misleading by the plaintiffs." Pet. App. A24.

Finally, the court of appeals noted that the fact that plaintiffs had won a judgment for $1.6 million for the female police detention aides plaintiff undermined the district court's ruling. Pet. App. A24-A25. Observing that a frivolous claim might merit a fee award even if joined with meritorious ones, the court observed that "the claim on which AFSCME prevailed was closely related to its other claims, and it was substantial by most measures." Pet. App. A25. The court concluded that the award of fees was "unwarranted under the Christiansburg standard, and the district court therefore abused its discretion in granting fees" to defendants. Pet. App. A25.

Because it concluded that the County was not entitled to fees under Christiansburg, the court of appeals found it unnecessary to reach the question whether the expert fee provision of the Civil Rights Act of 1991 applies retroactively. Pet. App. A16. It also rejected without comment a cross-appeal in which the County sought reversal of the district court's award of attorney's fees in favor of AFSCME in connection with its successful "police detention aide" claim.

ARGUMENT

This petition presents no issue for Supreme Court review. The unanimous decision below involved nothing more than the straightforward application of the long-settled Christiansburg standard to the facts of this case. The court's decision that no fees could be assessed against plaintiffs here was obviously correct given the validity of the plaintiffs' legal theories, the extensive and substantial evidence they adduced at trial in support of those theories, and the fact that petitioners prevailed at trial on claims of discrimination for which the affected

plaintiffs were awarded over $1.6 million. The County understandably does not ask this Court to reconsider Christiansburg's settled construction of the Title VII fee-shifting provision, and its efforts to conjure up a dispute among the lower courts concerning the proper application of the Christiansburg test are wholly unpersuasive.

The other issue on which petitioners now seek review -- the "retroactivity" vel non of a provision of Section 113 of the Civil Rights Act of 1991 -- was not even passed upon in the court of appeals, and is likewise entirely unsuited for Supreme Court review.

I. THE DECISION BELOW INVOLVED THE APPLICATION OF SETTLED LAW TO PARTICULAR FACTS, WAS PLAINLY CORRECT, AND PRESENTS NO ISSUE WHATSOEVER CALLING FOR REVIEW BY THIS COURT.

The issue before the Second Circuit was whether the district court had abused its discretion in concluding that the well-known criteria for a defendant's fee award under Christiansburg had been satisfied here. There was no dispute between the parties about the nature of legal standard to be applied, which had been clearly set forth in Christiansburg and its progeny and in scores of decisions in the lower courts. All that was disputed below was whether the record supported the district court's conclusion that the Christiansburg prerequisites had in fact been satisfied in this case. This Court does not sit to review the application of settled law to particular facts.

The court of appeals thoroughly understood the applicable legal standards, see Pet. App. A16-A17 (discussing Christiansburg), and set forth in detail compelling reasons why

plaintiffs in this case could not be liable for fees under Christiansburg. Among other things, it observed that:

> AFSCME established a prima facie case of a violation of Title VII; introduced extensive statistical evidence through the testimony of two expert witnesses which, if credited, could have supported a judgment in its favor; and won $1.6 million on its claim that the County intentionally discriminated in paying police detention aides (predominantly women) less than turnkeys (predominantly men).

Pet. App. A6. The court of appeals did not "eschew inquiry," Pet. 11, into whether plaintiffs' continued pursuit of this litigation was unreasonable -- to the contrary, the court below expressly addressed that question and resolved it against the County. Pet. App. A20-A24. The court's conclusion that plaintiffs' evidence was *sufficient to support a judgment in their favor* (Pet. App. A23-A24) demonstrates, a fortiori, that it was reasonable for them to pursue their claims to judgment.

The court of appeals' reversal of the fee award against plaintiffs was obviously correct. In addition to all the reasons canvassed by the court of appeals, the district court (1) failed to explain how it could have been unreasonable ex ante for plaintiffs to regard Exhibit 616 as potential "smoking gun" evidence demonstrating that the County had purposely skewed the results of the Cresap evaluation to downgrade female-dominated jobs in relation to male-dominated ones, (2) assessed fees for the entire 7-year history of the litigation even though the County claimed only that plaintiffs' continued pursuit of the case, although initially reasonable, "became" unreasonable

at the time of trial, see, e.g., Pet. 9-10, 12;[3] (3) explicitly disavowed the Christiansburg Court's warning that courts must avoid "post hoc" analysis of plaintiffs' unsuccessful claims as "sterile" and expressly assumed the "vantage point of time" in assessing plaintiffs' claims; (4) concluded, unprecedentedly, that the Christiansburg test applies with more rigor when the Title VII plaintiff is a large organization; and (5) allowed defendants to recover fees for work relating to the police detention aide claims even though plaintiffs *prevailed* on these claims and were *themselves* awarded fees. In short, the district court's ruling was itself an egregious departure from Christiansburg, and it was quite properly reversed. Petitioners do not identify, and have never identified, a single case in which a fee award was upheld under Christiansburg in remotely similar circumstances. As the court of appeals observed, a plaintiff that introduces evidence sufficient to go to trial and to "support[] a judgment in its favor," Pet. App. A6; see id. at A21-A24, cannot be liable for fees under any reasonable understanding of Christiansburg.

Seeking to manufacture an issue of law in this factbound case, petitioners assert that the Second Circuit improperly "collapse[d] the three disjunctive criteria" established in Christiansburg -- by which respondents mean the Court's use of the phrase "frivolous, unreasonable, or without foundation," see 434 U.S. at 421 -- into a "single standard of frivolousness." See Pet. 5, 10. This argument is itself frivolous.

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[3]The County now suggests (Pet. 12) that it was not until the middle of trial, after the close of Dr. Treiman's testimony, that AFSCME should have perceived the hopelessness of their case and withdrawn its claims. This argument, which was not made in the court of appeals, only highlights the district court's error in assessing fees against plaintiffs.

The Second Circuit expressly applied the entire Christiansburg standard as written by this Court.[4] Nothing in its opinion in any way conflicts with the understanding of that standard expressed by this Court and other federal courts.[5] The claimed conflict is based on the notion that three terms used to characterize those rare cases where defendants are entitled to fees have different meanings and must be applied independently. But the Christiansburg Court itself used the terms "frivolous," "groundless," "without foundation," and "unreasonable" interchangeably, 434 U.S. at 421-24, and never suggested that there is some significant category of cases that qualify, for example, as "unreasonable" without being "frivolous" (or vice versa). The Court counselled common-sense application of these "abstract words" in "concrete cases," Christiansburg 434 U.S. at 421; its analysis did not suggest that it was creating a three-part test to be applied in some mechanical fashion. In sum, the County's quibble with the Second Circuit's diction presents no reason to grant certiorari.

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[4]See Pet. App. A6 ("that AFSCME's claims were not 'frivolous, unreasonable or groundless'") (quoting Christiansburg; emphasis added); Pet. App. A19 ("After reviewing all the circumstances of this case and the proof introduced at trial, taken together, we are persuaded that AFSCME's case was not 'frivolous, unreasonable, or without foundation' so as to permit an award of fees under Title VII.") (quoting Christiansburg) (emphasis added).

[5]Contrary to petitioners' suggestions (Pet. 11), the court below did not espouse some new standard that would effectively allow defendants' fee awards only in cases of bad faith. See, e.g., Pet. App. A17.

II. THE SECOND QUESTION PRESENTED, RELATING TO WHETHER SECTION 113 OF THE CIVIL RIGHTS ACT OF 1991 AUTHORIZES EXPERT FEE AWARDS IN CASES ARISING BEFORE ITS ENACTMENT, IS EQUALLY UNWORTHY OF THIS COURT'S CONSIDERATION.

The County also asks the Court to grant certiorari on the question "[w]hether section 113 of the Civil Rights Act of 1991, which allows a prevailing party to recover expert fees, may be applied in cases arising before its enactment." But the court of appeals did not even reach that question, see Pet. App. A16, and petitioners are unable to point to any court that has adopted their position. Indeed, there are almost no reported decisions on point.[6] As this paucity of caselaw suggests, the "retroactivity" of Section 113 is not an issue of wide-ranging importance. Furthermore, whatever importance that issue may have had is rapidly diminishing now that almost six years have elapsed since Section 113 became law. In short, petitioners' second question presented is as unworthy of review as their first.

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[6]Shipes v. Trinity Indus., 31 F.3d 347 (5th Cir. 1994), is the only post-Landgraf court of appeals decision on the applicability of Section 113 in cases arising before its enactment; citing Landgraf, the Fifth Circuit held Section 113 inapplicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

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